

1                   IN THE UNITED STATES DISTRICT  
2                   FOR THE WESTERN DISTRICT OF TENNESSEE  
3                   WESTERN DIVISION

---

4                   UNITED STATES OF AMERICA,

5                   Plaintiff,

6                   vs.

7                   NO. 20-cr-20120-TLP-3

8                   KRISTOPHER HARRIS,

9                   Defendant.

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10                  MOTION TO SUPPRESS (RESUMED)

11                  BEFORE THE

12                  HONORABLE THOMAS L. PARKER

13                  December 15, 2020

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18  
19                  CATHERINE J. PHILLIPS, FAPR, RMR, CMRS  
20                  OFFICIAL REPORTER  
21                  FOURTH FLOOR FEDERAL BUILDING  
22                  MEMPHIS, TENNESSEE 38103  
23  
24  
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1                   **I N D E X**

	<u>PAGE</u>
4 <b>WITNESS: DET. DAVID HALLUM</b>	8
5 <b>DIRECT EXAMINATION (RESUMED) BY MS. CORNEJO</b>	9
6 <b>CROSS-EXAMINATION BY MR. PAYLOR</b>	12
7 <b>REDIRECT EXAMINATION BY MS. CORNEJO</b>	26
8 <b>CERTIFICATE</b>	54

	<u>EXHIBITS</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
12 <b>Exhibit No. 2</b>			7
	(Copy of photo lineup)		
14 <b>Exhibit No. 3</b>			26
	(Original photo array)		
15 <b>Exhibit No. 4</b>			46
	(Affidavit of Complaint)		

**Tuesday**

December 15, 2020

The MOTION TO SUPPRESS (RESUMED) in this case began on this date, Tuesday, December 15, 2020, at 1:30 p.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: Good afternoon.

MS. CORNEJO: Good afternoon, Your Honor.

THE COURT: This is in the matter of the United States versus Kristopher Harris. Ms. Cornejo is present on behalf of the Government. Mr. Paylor is here with his client, Mr. Harris.

Mr. Paylor, do you need a minute?

MR. PAYLOR: No, Your Honor, I'm good.

THE COURT: Okay. As y'all recall, we started the hearing back on November 24th, and the Court paused the hearing, if you will, so that the Government could obtain the original copy of the photo lineup.

Under the circumstances, the Court finds that giving the Government a chance to obtain that document was a fair approach under the circumstances. Although I understand the defendant's desire to see and compare the original to the

1 colored copy that was provided in discovery, the defendant  
2 didn't raise an issue about it until we got to court. And  
3 so -- for example, he didn't argue in the written motion that  
4 the photocopy was in any way insufficient. In fact, the  
5 defendant attached a photocopy of the lineup to the motion to  
6 suppress. And then relied on that to argue that it was  
7 unduly suggestive.

8 So he certainly has a right to compare it, and  
9 we're going to make that happen. And so I decided to take a  
10 short recess of a few days to give the Government a chance to  
11 obtain that.

12 So, Ms. Cornejo, have you had an opportunity to  
13 obtain the original?

14 MS. CORNEJO: Yes, Your Honor, I have a copy of  
15 the original, and I've shown Mr. Paylor. And I don't know at  
16 this juncture if Your Honor would like to compare the  
17 original to the copy?

18 THE COURT: Yes, I think that would be fine.

19 MS. CORNEJO: Okay. I have the original here.

20 THE COURT: I have a copy that was --

21 MS. CORNEJO: Okay. And I'm going to keep it in  
22 the folder so, Your Honor, it doesn't -- thank you.

23 THE COURT: And you have shown this to counsel?

24 MS. CORNEJO: Yes, Your Honor.

25 THE COURT: All right. Now, what we can do to

1 ensure that the record is clean, I think what we'll probably  
2 have to just make a copy of the original and return the  
3 original back to the Government. And I'll give you a chance  
4 to be heard, Mr. Paylor, in just a minute.

5 But I do want to say that I've now compared the  
6 original to the photocopy that was provided in the materials  
7 by the parties in terms of -- the photocopy that was attached  
8 to the documents. And it's in color, the copy is in color,  
9 the original is in color. The Court does not see a marked  
10 difference between the original and the photocopy.

11 Mr. Paylor, do you disagree with that or --

12 MR. PAYLOR: Your Honor, I wanted to be heard,  
13 because I didn't have an opportunity to compare the original  
14 with the copy the Court had been previously provided.

15 THE COURT: Sure.

16 MR. PAYLOR: I compared the original toward  
17 another copy that the Government had, and I notice some  
18 differences in the original as opposed to the copy that the  
19 Government showed me for comparison purposes.

20 I noticed that the original appeared to be  
21 brighter, and you can tell when you look at the background of  
22 each of the photos in the original as compared to the copy.

23 That's important, because what's at issue here is  
24 the eye color of the individual in position one that was  
25 identified by the witness.

1                   So I understand the Court has ruled that there's  
2 no marked difference between the copy the Court has and the  
3 original. I would suggest that the Court allow us to use the  
4 original when questioning the witnesses, and mark as an  
5 exhibit the copy the Court has.

6                   THE COURT: That's fine.

7                   MR. PAYLOR: Okay.

8                   THE COURT: Ms. Cornejo, I assume you don't have  
9 an objection to that?

10                  MS. CORNEJO: No, Your Honor. It's the  
11 Government's position that the copy is a true and accurate  
12 copy of the original. And whatever Your Honor feels  
13 comfortable -- for the record, we would just be seeking leave  
14 to admit one of those into evidence, whatever the Court  
15 decides in its discretion.

16                  THE COURT: So what I am looking at,  
17 Mr. Paylor -- and I'm going to mark this as an exhibit to the  
18 hearing -- it is just a color print -- a color printout of --  
19 it's Page ID Number, I believe, 87. And it is part of ECF  
20 Document 47-1, and it's page 2 of 3 of that exhibit.

21                  So I'm going to ask Mr. Knox to just mark that as  
22 an exhibit.

23                  (Exhibit No. 2 was admitted into evidence.)

24                  THE COURT: Is that Exhibit Number -- that's  
25 Exhibit Number 2. Okay. Just so the record's clear about

1 what we're talking about.

2 And then, Ms. Cornejo, when we interrupted the  
3 hearing, you had David Hallum on the witness stand and he had  
4 introduced, I believe, the Advice of Rights for the photo  
5 display, and you were going through that with him. And then  
6 Exhibit Number 2 was going to be the photo array and that's  
7 when we stopped.

8 Do you want to call Mr. Hallum back?

9 MS. CORNEJO: Yes, Your Honor. And just so we're  
10 clear, we're not starting over again; correct? I can start  
11 from Exhibit Number 2?

12 THE COURT: That's fine with me. I took notes on  
13 what he said.

14 MS. CORNEJO: All right. Thank you very much.

15 THE COURT: Yes, ma'am.

16 MS. CORNEJO: If we could call Detective Hallum  
17 to the stand again.

18 (Whereupon, Det. David Hallum duly sworn.)

19 THE WITNESS: Yes, sir.

20 MS. CORNEJO: May I have -- Exhibit 2, may I have  
21 it please.

22 Thank you, sir.

23 THEREUPON,

24 DET. DAVID HALLUM,

25 having been duly sworn, was examined and testified as

1           **TESTIMONY OF DET. DAVID HALLUM**

9

1           follows:

2           **DIRECT EXAMINATION (RESUMED)**

3           **BY MS. CORNEJO:**

4           Q.       All right. Good afternoon, Detective Hallum. Can you  
5           please spell and state your first and last name so the court  
6           reporter can write it down.

7           A.       David Hallum, D-A-V-I-D, H-A-L-L-U-M.

8           Q.       Now, Detective Hallum, you were assigned to assist in  
9           an investigation involving a carjacking with one of the  
10           defendants, Mr. Kristopher Harris; correct?

11           A.       Yes.

12           Q.       And previously you had testified on November 24th,  
13           2020, in this courtroom, did you not?

14           A.       Yes, I did.

15           Q.       I believe where we left off on August 14th of 2019,  
16           did you show the victim in the carjacking a photo array?

17           A.       Yes.

18           Q.       In one of those photo arrays, was it a photo array  
19           with the defendant, Kristopher Harris?

20           A.       Yes.

21           Q.       And can you tell us what happened after you showed the  
22           victim the photo array.

23           A.       The victim identified Kristopher Harris.

24           MS. CORNEJO: Your Honor, may I publish to the  
25           Court, since Exhibit 2 has been admitted into evidence?

TESTIMONY OF DET. DAVID HALLUM

10

1 THE COURT: Yes.

2 MS. CORNEJO: Thank you, Your Honor.

3 THE COURT: Any objection to that, Mr. Paylor?

4 MR. PAYLOR: Your Honor, again, this is the copy,  
5 not the original, right, just for the record?

6 THE COURT: Yes, sir.

7 BY MS. CORNEJO:

8 Q. Can you please tell us who the complaining witness  
9 identified in this photo array?

10 A. The picture in the top left corner.

11 Q. All right. And how did the complaining witness  
12 indicate that that was the person that was involved in the  
13 carjacking?

14 A. He circled the photo and put his initials and the  
15 date.

16 Q. Did he also write something at the bottom of what's  
17 been previously marked as Exhibit Number 2?

18 A. Yes.

19 Q. And what did the complaining witness write?

20 A. This is carjacker that shot in my car.

21 Q. Was the victim's signature also at the bottom of the  
22 photo array to indicate that this was the person that he  
23 identified --

24 A. Yes.

25 Q. -- as the shooter? I'm sorry, as the shooter.

1           **TESTIMONY OF DET. DAVID HALLUM**

11

1           A.       **Yes.**

2           Q.       **Do you see Mr. Harris in court today?**

3           A.       **Yes.**

4           Q.       **Can you please point to him and tell us something that**  
5           **he is wearing.**

6           A.       **The male that's wearing the orange jacket.**

7           Q.       **And is the man that is seated here --**

8                   **THE COURT: Ms. Cornejo, I'm going to interrupt**  
9           **you for a second. Could we just have the witness hold the**  
10           **microphone, and that way --**

11                   **THE WITNESS: Is this better?**

12                   **THE COURT: Yes, sir, much better. Thank you.**

13           **BY MS. CORNEJO:**

14           Q.       **And, Detective Hallum, the man that is seated over**  
15           **there, Kristopher Harris, is that the same Kristopher Harris**  
16           **that the victim identified in the photo array on August 14th,**  
17           **2019?**

18           A.       **Yes.**

19           Q.       **Did you tell the victim who to identify in the lineup?**

20           A.       **No.**

21           Q.       **Did you suggest to the victim who to identify in the**  
22           **lineup?**

23           A.       **No.**

24                   **MS. CORNEJO: I have nothing further.**

25                   **THE COURT: Okay. And where is the original? Do**

1                   **TESTIMONY OF DET. DAVID HALLUM**

12

1       you have it?

2                   MS. CORNEJO: I have it right here, but if  
3 Your Honor would like it for safekeeping.

4                   THE COURT: I think Mr. Paylor is going to want  
5 to question with it. That's all.

6                   MS. CORNEJO: Sure. Here you go, Mr. Paylor, if  
7 you need it. (Tendered.)

8                   MR. PAYLOR: I won't lose it.

9                   THE COURT: Mr. Paylor.

10                  MR. PAYLOR: Thank you, Your Honor.

11                   CROSS-EXAMINATION

12                  BY MR. PAYLOR:

13                  Q. Detective Hallum, can you hear me fine?

14                  A. Yes, sir.

15                  Q. Okay.

16                  MR. PAYLOR: Can the court reporter hear me fine?

17                  COURT REPORTER: Yes, sir.

18                  BY MR. PAYLOR:

19                  Q. Okay. I have a few questions regarding your testimony  
20 that you gave to us on November the 24th and today.

21                  If you don't understand a question that I ask, if  
22 you'll just ask me to repeat it and I will. Okay?

23                  A. Okay.

24                  Q. Now, you were assigned to investigate this carjacking  
25 that occurred on that night; is that right?

**TESTIMONY OF DET. DAVID HALLUM**

13

1 A. Yes.

2 Q. Okay. And as a part of your investigation, did you  
3 review any documents?

4 A. Yes.

5 Q. What documents did you review?

6 A. I read over the incident report. I read over the  
7 report. I read over the victim's statement.

8 Q. Okay. And the incident report, did it provide a  
9 description of the individuals who were responsible for the  
10 carjacking?

11 A. I don't remember.

12 Q. Okay. Did the victim's statement provide a  
13 description of the individuals who were responsible for the  
14 carjacking?

15 A. It did. I don't remember exactly what it said,  
16 though.

17 Q. Do you recall reviewing any documentations during the  
18 course of your investigation that identified any other  
19 suspects as having light eyes or gray eyes?

20 A. No.

21 Q. You didn't review any of that information?

22 A. Not that I'm aware of.

23 Q. Okay. Did you review any of the body cam footage from  
24 the officers?

25 A. No.

**TESTIMONY OF DET. DAVID HALLUM**

14

1 Q. So the extent of your investigation was you reviewed  
2 the documents that you just testified to, incident report,  
3 affidavit of complaint, and the victim's statement; is that  
4 right?

5 A. There were more, but, yes, that is what I said.

6 Q. What other documents did you review?

7 A. And then statements that two of the defendants gave  
8 me.

9 Q. No, I'm not asking you what you reviewed in  
10 preparation for this hearing. What I'm asking you is what  
11 you reviewed during the course of your investigation of the  
12 matter.

13 A. Yes, during the course of my investigation I also  
14 reviewed defendants' statements.

15 Q. The statements from what defendants?

16 A. From Kalonji Warren and Kristopher Harris.

17 Q. Now, prior to you compiling this photo identification  
18 and presenting it to the victim in this matter, Mr. Harris  
19 hadn't been arrested; right?

20 A. Correct.

21 Q. So at that point in your investigation you had not  
22 reviewed any statement from Mr. Harris; is that right?

23 A. Correct.

24 Q. At that point in your investigation, had you reviewed  
25 any statements from any other defendants?

1           **TESTIMONY OF DET. DAVID HALLUM**

15

1           A.        Kalonji Warren.

2           Q.        And do you recall if Mr. Warren's statement  
3           identified, by physical description, any of the other  
4           individuals that may have been involved?

5           A.        I don't recall if he provided a description. He named  
6           Kristopher Harris.

7           Q.        Okay. Now, during your direct testimony on November  
8           the 24th, 2020, you went over the process that you used to  
9           generate the photo array; right? Do you recall that?

10          A.        Yes.

11          Q.        And what you testified to is you use a program called  
12           Mug Shots; is that right?

13          A.        Yes.

14          Q.        And that program is a computer-generated program that  
15           stores all of the mug shots in a database; is that right?

16          A.        Yes.

17          Q.        And those mug shots include old people, young people,  
18           black people, white people; right?

19          A.        Yes.

20          Q.        It also includes Hispanics and others; right?

21          A.        Yes.

22          Q.        So this program is, in essence, a database of all the  
23           mug shots in -- is it Shelby County?

24          A.        As far as -- I don't know exactly what counties' mug  
25           shots are loaded into it. I do know that Shelby County's

1           **TESTIMONY OF DET. DAVID HALLUM**

16

1       booking photos are uploaded into it.

2   Q.        Okay. So once you get in this program, you input  
3       certain criteria; is that right?

4   A.        I input the first and last name.

5   Q.        To generate mug shots of a specific individual?

6   A.        People that have been booked into jail with that same  
7       name.

8   Q.        Okay. And once you've done that, you select that mug  
9       shot -- you select a mug shot of that individual's name to be  
10      used.

11   A.        Yes.

12   Q.        All right. Now, once you select that mug shot, you  
13      take that mug shot and do what with it?

14   A.        I click a random position button.

15   Q.        Okay.

16   A.        It moves that photo and populates it into a random  
17      position in the lineup.

18   Q.        Okay. And once that photo is put in a random  
19      position, where do the other photos in the photo array come  
20      from?

21   A.        There is a button you click for similar photos.

22   Q.        Okay.

23   A.        So I clicked it.

24   Q.        All right. And when you click the button that says  
25      similar photos, do you select which photos to use?

1           **TESTIMONY OF DET. DAVID HALLUM**

17

1           A.       **Yes.**

2           Q.       So in this program you click on similar photos; right?

3           A.       **Yes.**

4           Q.       And a population of photos is generated; is that  
5           right?

6           A.       **Yes.**

7           Q.       And this population can be thousands of photos?

8           A.       **Yes, it could be.**

9           Q.       And you go through that population of photos and  
10          select individuals to be placed in this photo lineup; is that  
11          right?

12          A.       **Yes.**

13          Q.       And when you're selecting the individuals to be placed  
14          in that photo array, do you just select the first six people,  
15          or what process do you use to select those individuals?

16          A.       I scroll through photos and find photos similar to  
17          people I'm creating a lineup for.

18          Q.       Okay. And when you're selecting people that are  
19          similar to the photo -- to the mug shot that you selected,  
20          what criteria do you use to determine who is and who isn't  
21          similar?

22          A.       It varies. Are you asking what I used for Kristopher  
23          Harris or --

24          Q.       I'm asking you what process you use, and then I will  
25          ask questions regarding --

1           **TESTIMONY OF DET. DAVID HALLUM**

18

1           A.        It just varies based on the individual I'm trying to  
2           create a lineup for.

3           Q.        Okay. So when you look at the photo -- the mug shot  
4           that you start with, you see the eye color; is that right?

5           A.        Yeah, you can see the eye color.

6           Q.        Okay. You see a hairstyle?

7           A.        Yeah.

8           Q.        You see tattoos?

9           A.        Yeah.

10          Q.        You see complexion?

11          A.        Yeah.

12          Q.        And you select five other individuals with similar eye  
13           color; right?

14          A.        You can, yes.

15          Q.        Do you?

16          A.        If eye color jumps out at me, I will.

17          Q.        Okay. Hairstyles, do you select individuals with  
18           similar hairstyles?

19          A.        Yes. If it's a distinct hairstyle, I will.

20          Q.        Do you select individuals with tattoos in similar  
21           places?

22          A.        Yes.

23          Q.        And do you select individuals with similar skin  
24           complexion?

25          A.        Skin complexion is a little tricky. Lighting can

1           **TESTIMONY OF DET. DAVID HALLUM**

19

1           affect skin complexion based in the photo. So that one's a  
2           little more difficult.

3           Q.        But you see all the photos before you generate the  
4           photo array; is that correct? Right?

5           A.        Yes.

6           Q.        So whatever the lighting situation is, when you see  
7           the skin complexion on the photo, you have the ability to  
8           select that individual as similar skin complexion; is that  
9           right?

10          A.        Yes, you do have the ability.

11          Q.        Okay. Did you do those things in this particular  
12           case?

13          A.        All of those things?

14          Q.        Yes.

15          A.        I don't remember all of the criteria that I used.

16          Q.        Do you remember any of the criteria you used?

17          A.        I know -- yes, I do.

18          Q.        So you testified that you used the criteria of young  
19           black male, in their early twenties; is that right?

20          A.        No, I did not.

21          Q.        What did you use?

22          A.        Selected the similar photo, similar options button --

23          Q.        Right.

24          A.        -- and it generates -- I don't know the specific  
25           criteria it uses. It uses age, plus or minus so many years;

1           **TESTIMONY OF DET. DAVID HALLUM**

20

1           height, plus or minus so many inches; weight, plus or minus  
2           so many pounds.

3           Q.        Okay.

4           A.        Hair color listed. Eye color listed. I don't know  
5           what parameters the computer system uses to give me all of  
6           those photos.

7           Q.        Okay. What parameters do you use when you're viewing  
8           that population of photos to come to your final photo array?

9           A.        It depends on how broad or how specific of a  
10           description I have.

11           Q.        So what description were you provided in this case?

12           A.        If I remember correctly, the description that was  
13           given in the victim's statement was fairly broad of  
14           Kristopher Harris, of the person that fired the shot.

15           Q.        What description was that?

16           A.        A male black. He had a mask on his face. A hood  
17           tied -- like a hoodie up over his hair.

18           Q.        So he did see the hair? In his statement he didn't  
19           give a hairstyle, hoodie over the head?

20           A.        If I recall, I don't think so, but I could be mistaken  
21           in the statement.

22           Q.        Okay. He testified that the individual had a mask on?

23           A.        Yes.

24           Q.        He testified that he could only see the eyes?

25           A.        I don't remember if he testified that he could only

1           **TESTIMONY OF DET. DAVID HALLUM**

21

1       see the eyes or not.

2       Q.       I'm sorry, I used the wrong word. There's been no  
3           testimony thus far.

4           In his statement, in the description he gave in his  
5           statement, did he testify that he could only see the eyes?

6       A.       I don't remember.

7       Q.       Okay. I'm going to show you --

8           MR. PAYLOR: May I see Exhibit 2, Your Honor.

9           BY MR. PAYLOR:

10      Q.       I'm displaying Exhibit 2 to you. And these are the  
11           individuals that you selected for this photo array; is that  
12           right?

13      A.       Yes.

14      Q.       Okay. Now, comparing number 5 to number 1, would you  
15           say that number 5's complexion is lighter than number 1?

16      A.       It could be, yes.

17      Q.       What do you mean when you say it could be?

18      A.       I don't know the lighting conditions when the photo  
19           was taken. The lighting could have a flash when the camera  
20           was taken, and that could make the appearance of number 5  
21           having a lighter complexion.

22      Q.       Okay. Sticking to the appearance on this photo array,  
23           not what this person may actually look like outside of the  
24           photo array.

25      A.       Okay.

1           **TESTIMONY OF DET. DAVID HALLUM**

22

1           Q.        But sticking to what you provided the victim in this  
2           case, is it a fair statement that number 5 has a lighter  
3           complexion than number 1?

4           A.        Yes.

5           Q.        And number 4 has a lighter complexion than number 1?

6           A.        Yes.

7           Q.        Are you able to see the eye complexion of number 4 and  
8           number 2?

9           A.        Yes.

10          Q.        And do each of those individuals have dark-colored  
11           eyes?

12          A.        They appear to from here.

13          Q.        Okay. Does number 1 in this photo lineup appear to  
14           have dark-colored eyes?

15          A.        They appear to, from here.

16          Q.        So -- I zoomed in. And can you tell if number 1 has  
17           dark-colored eyes in Exhibit 2?

18                   THE COURT: Sometimes looking at the smaller  
19                   monitor -- I'm noticing that the resolution on that big  
20                   screen's not great. I don't know if that helps at all.

21                   MR. PAYLOR: Maybe I can just pass him the  
22                   exhibit.

23                   THE COURT: That will be fine.

24                   MR. PAYLOR: May I approach?

25                   THE COURT: Yes, sir.

1 **TESTIMONY OF DET. DAVID HALLUM**

23

1 BY MR. PAYLOR:

2 Q. In comparing the eye color of number 1 to number 2,  
3 can you tell from Exhibit 2 if number 1 has lighter eyes than  
4 number 2?

5 A. I can't tell from here. Number 1's eyes look dark.  
6 Number 2's eyes look almost black.

7 Q. Okay. Number 1 -- compare number 1's eye color to  
8 number 3's eye color. Does number 1's eyes appear lighter  
9 than number 3?

10 A. They look pretty close to being the same to me.

11 Q. Okay. Comparing number 1's eye color to number 4's  
12 color. Does number 1's eye color appear to be lighter on  
13 Exhibit 2?

14 A. Maybe. It looks fairly close to me.

15 Q. Okay. Comparing number 1 to number 5 on Exhibit 2,  
16 does number 1's eye color appear to be lighter?

17 A. They all look pretty close to me.

18 Q. Okay. Comparing number 1 to number 6 on Exhibit 2,  
19 does number 1's eye color appear to be lighter?

20 A. It could be. They look pretty close to me, all of  
21 them do.

22 Q. Okay.

23 MR. PAYLOR: Your Honor, I'm going to pass the  
24 witness the original.

25 THE COURT: Okay.

TESTIMONY OF DET. DAVID HALLUM

24

1 MR. PAYLOR: And I'll take Exhibit 2 back.

2 BY MR. PAYLOR:

3 Q. Now, looking at the original that I just passed to  
4 you, do the photos in the original document appear to be  
5 lighter in color than Exhibit 2? And if you need Exhibit 2  
6 back, I can pass it back to you.

7 A. Can I see it again?

8 Q. (Tendered.)

9 A. (Reviewing exhibits.)

10 Q. Let me know when you're finished comparing the two.

11 A. All right.

12 Q. Is it a fair statement that the original -- the  
13 overall appearance of every photo in the original is lighter  
14 than that in Exhibit 2?

15 A. Yes.

16 Q. And in the original can you see that the individual in  
17 position 1 has lighter eyes than the individual in position  
18 number 2?

19 A. Yes.

20 Q. Can you see that the individual in position number 1  
21 has lighter eyes than the individual in position number 3?

22 A. He may have lighter eyes. They're pretty close to me.

23 Q. And the individual in number 1 compared to the  
24 individual in number 4, number 1 would have the lighter eyes;  
25 is that right?

1           **TESTIMONY OF DET. DAVID HALLUM**

25

1           A.       **Yes.**

2           Q.       And the individual in number 1 to the individual in  
3           number 5, number 1 has lighter eyes than the individual in  
4           number 5; is that right?

5           A.       I mean, yeah, he could have.

6           Q.       And the individual in position number 1 to the  
7           individual in position number 6, that individual appears to  
8           have lighter eyes; is that right?

9           A.       **Yes.**

10          Q.       Could I have those exhibits back.

11                 THE COURT: Mr. Paylor, why don't we go ahead and  
12                 mark -- Ms. Cornejo, I think we should probably mark  
13                 exhibit -- the original document. Just so the record's  
14                 clear, we'll make a photocopy and give you the original back.  
15                 But I think we need to show for the record that we compared  
16                 the documents.

17                 MS. CORNEJO: Yes, Your Honor. No objection.

18                 THE COURT: Do you agree, Mr. Paylor?

19                 MR. PAYLOR: I do, Your Honor.

20                 CASE MANAGER: Will it be Exhibit 3? Is this for  
21                 ID or we'll be admitting it?

22                 THE COURT: We'll call it Exhibit Number 3.  
23                 We're going to admit that as the original photo array that  
24                 was marked by the witness. And then we will substitute a  
25                 photocopy of that document in our record.

TESTIMONY OF DET. DAVID HALLUM

26

1 (Exhibit No. 3 was admitted into evidence.)

2 MR. PAYLOR: Can I just leave this exhibit here  
3 in case Ms. Cornejo --

4 THE COURT: Certainly.

5 BY MR. PAYLOR:

6 Q. Now, Detective Hallum, just to be clear, you don't  
7 have any recollection of what the victim identified  
8 Mr. Harris as appearing to look like; is that right?

9 A. I did not take the victim's statement from the victim.

10 Q. I mean, but from your review of that statement you  
11 just don't recall what that description was?

12 A. I don't remember specifics. I do remember that it was  
13 a broad description, but I don't remember specifics on what  
14 he said.

15 MR. PAYLOR: All right. Nothing further,  
16 Your Honor.

17 THE COURT: All right. Ms. Cornejo, redirect?

18 MS. CORNEJO: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MS. CORNEJO:

21 Q. Very briefly, Detective.

22 You previously testified under cross that you did not  
23 take the signed statement by the complaining witness in this  
24 matter; correct?

25 A. Yes.

1           **TESTIMONY OF DET. DAVID HALLUM**

27

1           Q.       Prior to showing the victim the photo array on  
2           August 14th, 2019, did you have a conversation with Kalonji  
3           Warren?

4           A.       Yes.

5           Q.       And I know you've previously testified to this, but  
6           did Kalonji Warren implicate anybody else by name as involved  
7           in the carjacking with him?

8           A.       Yes.

9           Q.       Who was that?

10          A.       Kristopher Harris.

11          Q.       Based on that conversation with Kalonji Warren, what  
12         did you do next?

13          A.       I generated the photo lineup.

14          Q.       Can you tell the Court the specific reason why you  
15         picked Mr. Harris to be in the photo array?

16          A.       He was named by Kalonji Warren.

17          Q.       Now, counsel asked you a lot of questions about skin  
18         tone and eye color, do you remember that, under  
19         cross-examination?

20          A.       Yes.

21                   MS. CORNEJO: For the record, I am publishing  
22                   Exhibit Number 2 that has been previously -- that has been  
23                   entered.

24                   THE COURT: Yes, ma'am.

25                   MS. CORNEJO: Thank you, Your Honor.

1 **TESTIMONY OF DET. DAVID HALLUM**

28

1 BY MS. CORNEJO:

2 Q. Now, again, who is in position number 1 in this  
3 photograph?

4 A. Kristopher Harris.

5 Q. And if you had to state -- you previously identified  
6 Mr. Harris as the man in the orange jumpsuit seated at  
7 defense table; correct?

8 A. Yes.

9 Q. Would you say that the photograph of Mr. Harris is  
10 darker or lighter -- does his complexion look darker or  
11 lighter in the photograph as opposed to real person?

12 A. Can we turn the lights back on?

13 MS. CORNEJO: Yes, sir. Your Honor, if we may.

14 THE WITNESS: The photograph looks darker to me.

15 BY MS. CORNEJO:

16 Q. And, again, can you explain what would the variation  
17 of that be?

18 A. Lighting conditions when he's booked in the jail,  
19 camera settings could have something to do with it. I don't  
20 know.

21 Q. Just to be clear, who circled number 1 in the photo  
22 array?

23 A. The victim.

24 Q. Did you tell the victim who to identify?

25 A. No.

1                   **TESTIMONY OF DET. DAVID HALLUM**

29

3                   1                   MS. CORNEJO: Nothing further.

4                   2                   THE COURT: All right. Thank you, Mr. Hallum.

5                   3                   You're excused.

6                   4                   (Whereupon, witness excused.)

7                   5                   THE COURT: Could I see Exhibits 2 and 3.

8                   6                   MS. CORNEJO: Yes, Your Honor.

9                   7                   THE COURT: All right. Ms. Cornejo?

10                  8                   MS. CORNEJO: Your Honor, I understand that we  
11                  9                   have previously -- the Government will be seeking leave to  
12                  10                  call the complaining witness in this case.

13                  11                  THE COURT: Yes, ma'am.

14                  12                  MS. CORNEJO: Mr. Stevens. David Stevens.

15                  13                  THE COURT: David Stevens.

16                  14                  MS. CORNEJO: Yes, sir.

17                  15                  MR. PAYLOR: Your Honor, can I request Jencks  
18                  16                  material at this point, so that I can have it to review  
19                  17                  before I cross-exam?

20                  18                  MS. CORNEJO: I don't have any Jencks material --  
21                  19                  I don't know what kind of Jencks material you would be  
22                  20                  requesting. He has never testified.

23                  21                  THE COURT: You all want to come around.

24                  22                  (Whereupon, there was a side bar conference.)

25                  23                  THE COURT: If you would just speak into the mic.  
Is there anything in particular, Mr. Paylor, you're  
expecting?

1                   MR. PAYLOR: Well, the officer just testified  
2 that he provided --

3                   THE COURT: Took a statement?

4                   MR. PAYLOR: -- took a statement.

5                   THE COURT: Right.

6                   MR. PAYLOR: So that would be Jencks material.

7                   THE COURT: Okay.

8                   MS. CORNEJO: I think we tendered that statement  
9 to you.

10                  THE COURT: Do you have it? It was part of  
11 discovery.

12                  MR. PAYLOR: I don't recall having that as part  
13 of discovery.

14                  THE COURT: That surprises me.

15                  MR. PAYLOR: I mean, I can look to see if it's in  
16 my discovery, but, typically, I don't.

17                  If you have a copy of it, it would just be easy  
18 to --

19                  MS. CORNEJO: So here's my only --

20                  THE COURT: You wouldn't get a copy of a witness  
21 statement as a part of discovery?

22                  MR. PAYLOR: The Government typically doesn't  
23 provide copies of victim's statements to us until a trial or  
24 some other kind of hearing.

25                  THE COURT: Well, you've been talking about an

1 aspect of the statement --

2 MR. PAYLOR: That I got from the dash cam review.

3 THE COURT: I've got you. Okay.

4 MR. PAYLOR: If there is nothing, if the  
5 Government's saying there --

6 THE COURT: Do you have --

7 MS. CORNEJO: We do have a victim's statement.  
8 I'll double check and see if we've tendered it. But before  
9 we --

10 MR. PAYLOR: I can look at my computer real  
11 quick.

12 MS. CORNEJO: Before we proceed, I know we've  
13 gone over this again. I don't feel that we should have to  
14 put our victim on right now. At this juncture he has not  
15 made any showing that this is unduly suggestive. If  
16 Your Honor makes a finding that the lineup was unduly  
17 suggestive, then the Government has to rebut that.

18 I think us having to put the victim on the stand  
19 is papering him up for trial. And at this juncture, I don't  
20 think counsel has met his burden.

21 MR. PAYLOR: I would disagree, Your Honor, if you  
22 want to hear arguments on that now. I would disagree. I  
23 think the witness -- the only witness that has testified has  
24 testified that one individual has lighter eyes than the other  
25 individuals. That same witness testified that he was the one

1 responsible for generating the photo lineup. That it wasn't  
2 computer-generated randomly. There was a computer --

3 THE COURT: Say that again.

4 MR. PAYLOR: It wasn't computer-generated  
5 randomly.

6 THE COURT: It was not?

7 MR. PAYLOR: It was not. There was a computer  
8 generation of a population of individuals that he could  
9 select from. And he testified that he went in and selected  
10 the individuals to be placed in this photo lineup. And he  
11 did that with the person in position number 1, then the only  
12 one with light eyes. And it's my position that this victim  
13 is going to testify that he provided a description to the  
14 officers that the individual involved had gray eyes.

15 So I think I've met my burden as it relates to  
16 the first part of the test.

17 THE COURT: What is that test?

18 MR. PAYLOR: That there is subjectiveness in the  
19 photo lineup.

20 THE COURT: I think it's actually that it's  
21 unduly suggestive.

22 MR. PAYLOR: Right, unduly suggestive.

23 THE COURT: Right. Which that's a burden. And  
24 so the last time we were here you asked that we get the  
25 original, and that the Court at least have the original so

1 that you could examine the witnesses from it.

2 So what about the photo array -- you have focused  
3 on the eye color of your client versus -- and your client's  
4 photograph versus the other five photographs in the photo  
5 array.

6 MR. PAYLOR: That were presented to the victim.

7 THE COURT: Okay. What else about the photo  
8 array from your perspective was unduly suggestive?

9 MR. PAYLOR: The eye color.

10 THE COURT: Period, end of story.

11 MR. PAYLOR: The eye color. Because this  
12 witness, he was in -- the first thing out of his mouth on his  
13 body cam was, they had light -- they had gray eyes. Which is  
14 indicative of someone being responsible who had light-colored  
15 eyes.

16 THE COURT: Okay. But do you agree with the  
17 Government that before we get to -- I'm not saying that you  
18 agree with her in terms of the conclusion she's drawing,  
19 other than -- it's a two-step process. You've got to first  
20 raise a question about the suggestiveness of the photo array  
21 before they go further into proving, you know, the rest of  
22 what might be called upon in a hearing like this.

23 MR. PAYLOR: I do agree that I have to point to  
24 something in this photo array that is unduly suggestive. And  
25 my argument is the fact that only one individual in this

1 photo array has light eyes. It's unduly suggestive to a  
2 victim who --

3 THE COURT: Who mentioned the eyes out of the  
4 gate --

5 MR. PAYLOR: Right.

6 THE COURT: -- if you will.

7 MR. PAYLOR: And as the witness testified, the  
8 victim testified that the person he saw had a mask over the  
9 lower part of his face and a hood over the top part of his  
10 face.

11 THE COURT: So the eyes were very important.

12 MR. PAYLOR: Right.

13 THE COURT: All right. Ms. Cornejo, why  
14 shouldn't we go further?

15 MS. CORNEJO: Because as Detective Hallum  
16 testified, he did not rely on anything the victim had said.  
17 He did not interview the victim. The main reason Mr. Harris  
18 was picked to be in this photo array -- and, quite frankly,  
19 one of the only reasons, it's our position, is because he was  
20 implicated by Kalonji Warren. He was identified by Kalonji  
21 Warren by name. So --

22 And, respectfully, we would argue this was a  
23 computer-generated photo array. He put in Kalonji Warren's  
24 name and --

25 THE COURT: You mean Kristopher Harris.

1 MS. CORNEJO: I'm sorry. I apologize. It all  
2 gets mixed up.

3 THE COURT: I understand.

4 MS. CORNEJO: Again, I understand counsel's  
5 position and we're willing to move forward. We just wanted  
6 the record to be clear that at this juncture we're objecting  
7 to having to go on to step 2, if that's what Your Honor  
8 rules, just simply because it is our position that we don't  
9 feel that the defense has met its burden.

10 MR. PAYLOR: I would add that the Government kind  
11 of glosses over the fact that the witness testified that he  
12 reviewed the incident report, the affidavit of complaint, and  
13 the victim's statement in this matter. Not just --

14 THE COURT: In preparation for his testimony, I  
15 thought.

16 MR. PAYLOR: He said -- I went back and clarified  
17 what he reviewed at that juncture in the investigation. And  
18 he said he reviewed the incident report, the affidavit of  
19 complaint, and the victim's statement, as well as the  
20 statement of someone else involved in --

21 THE COURT: But he didn't say that he had  
22 reviewed the body cam, did he?

23 MR. PAYLOR: No, not the body cam.

24 THE COURT: Okay. And I haven't seen the  
25 victim's statement yet.

1 MR. PAYLOR: Right.

2 THE COURT: All right. Let me -- let's take a  
3 break real quick. I'm going to consult my lawyer and we'll  
4 come back.

5 MR. PAYLOR: Okay.

6 MS. CORNEJO: Thank you.

7 (Whereupon, the side bar conference concluded and a recess  
8 was had.)

9 CASE MANAGER: All rise. This Court stands in a  
10 brief recess.

11 THE COURT: All right. We're back on the record  
12 in the matter of United States versus Kristopher Harris.

13 Mr. Paylor, the Government is arguing that there  
14 are two steps to the analysis; one, that you first have to  
15 show that the photo array was unduly suggestive. And if the  
16 Court finds that the photo array is not unduly suggestive,  
17 then we don't even go to the rest of the analysis.

18 Do you agree with that position?

19 MR. PAYLOR: Your Honor, I agree that there is  
20 two requirements before a photo identification can be  
21 excluded from the proceedings. And those -- the two steps  
22 are that the photo -- or the identification itself is unduly  
23 suggestive by either impermissibly suggestive or --

24 THE COURT: I'm having a hard time hearing you.  
25 Do you have your mic on?

1                   MR. PAYLOR: Yes. It's our position that before  
2 a Court can exclude a photo identification, the Court has to  
3 determine that the photo is unduly suggestive, meaning that  
4 it is impermissibly suggestive, unnecessarily suggestive, and  
5 in the totality of the circumstances that the photo  
6 identification is unreliable. So I believe those are the two  
7 parts a Court has to determine.

8                   THE COURT: But if the Court makes a  
9 determination that the photo array is not unnecessarily,  
10 unduly, however you want to describe in step 1, that the  
11 photo array was improper, say that, is there any need to go  
12 further with the hearing?

13                  MR. PAYLOR: I believe it is, Your Honor. For  
14 the simple fact that we're creating a record that would be  
15 subject to appellate review. So if the Court stops the  
16 hearing after that finding, and an Appellate Court determines  
17 that the Court may have erred, then we still have to come  
18 back to answer this totality of the circumstances portion,  
19 which we can do in the --

20                  THE COURT: Well, but am I right -- the way I  
21 read the cases is the only way you get to step 2 is if you  
22 find that step 1 was met.

23                  Do you agree with that?

24                  MR. PAYLOR: I agree that it's our burden to show  
25 to the Court that the photo --

1                   THE COURT: That's not what I'm saying. I'm not  
2 talking about whose burden it is. I'm saying, if the Court  
3 finds that the photo array is not unduly suggestive, could  
4 number 2 somehow override number 1? In other words, could  
5 the totality of circumstances still apply to the point where  
6 I wouldn't allow the identification?

7                   MR. PAYLOR: I think it could if Your Honor was  
8 saying that it's a close call that it's unduly suggestive or  
9 not. And the totality of the circumstances makes the Court  
10 lean towards one direction or the other.

11                  But if the Court clearly says it's not unduly  
12 suggestive and it's not even a close call, then the Court is  
13 free to, you know, make whatever ruling the Court wants and  
14 stop the hearing.

15                  THE COURT: Okay.

16                  MR. PAYLOR: If the Court wanted to. But I think  
17 it's supposed to go completely through the process --

18                  THE COURT: All right.

19                  MR. PAYLOR: -- and the Court make a  
20 determination.

21                  THE COURT: Thank you, Mr. Paylor.

22                  MR. PAYLOR: Okay.

23                  THE COURT: Ms. Cornejo, Mr. Paylor wants to have  
24 his cake and eat it too. So here's the way I look at it.  
25 If --

1                   Let me ask you this, Mr. Paylor. Let's say that  
2 Ms. Cornejo says, Judge, we're going to hold right here.  
3 We're going to stop here and let the Court rule.

4                   Do you have any proof on the subject of whether  
5 the photo array is suggestive? Do you have any other proof  
6 to put on?

7                   MR. PAYLOR: No, Your Honor. I think --

8                   THE COURT: You would just argue from the --

9                   MR. PAYLOR: I would just argue based on -- the  
10 only proof we could have regarding the photo array being  
11 suggestive is the testimony of the officer that generated it.

12                  THE COURT: Oh, I'm not suggesting you do need  
13 it. I, just for the record, wanted to point out you don't  
14 have anybody that you would call in terms of rebuttal or  
15 anything like that?

16                  MR. PAYLOR: No.

17                  THE COURT: Okay. All right. Well, Ms. Cornejo?

18                  MS. CORNEJO: Your Honor, at this point we rest.

19                  THE COURT: All right.

20                  MS. CORNEJO: May I make the record very clear  
21 though. We do have the victim here, but we are not calling  
22 the victim to testify, because it is our position that step 1  
23 of -- that the photo array was not unduly suggestive.

24                  THE COURT: Okay. Mr. Paylor, we had a brief  
25 argument here at side bar. Is there anything you want to say

1 about the photo array that -- you know, to make sure that the  
2 record is complete before I rule?

3 MR. PAYLOR: Well, Your Honor, I would like to  
4 have admitted as a part of this hearing a copy of the  
5 affidavit of complaint that the witness testified he  
6 reviewed. And in that affidavit of complaint I asked the  
7 witness directly whether or not he reviewed any body cam  
8 footage in this situation, and he testified that he did not.  
9 But the affidavit of complaint suggests otherwise.

10 THE COURT: Do you have a copy of it?

11 MR. PAYLOR: I don't have it printed out. I can  
12 print it out.

13 THE COURT: Do you have a copy?

14 MS. CORNEJO: Yes, Your Honor.

15 THE COURT: All right. Do you have any objection  
16 to making that a part of the record?

17 MS. CORNEJO: No, Your Honor.

18 MR. PAYLOR: Let me see if that's the same  
19 document I'm referring to.

20 THE COURT: Yes, let's make sure we're talking  
21 about the same thing.

22 (Reviewing document.)

23 MR. PAYLOR: That's not the one I'm referring to.

24 MS. CORNEJO: Which one did you want? The one  
25 for --

MR. PAYLOR: The one that was prepared by Detective Hallum.

MS. CORNEJO: The affidavit of complaint? Which one is that one?

MR. PAYLOR: I'm going to refer --

MS. CORNEJO: Okay. I'll look for it.

Point me in the right direction. I'll be more  
than willing to help you.

MR. PAYLOR: I'm just getting to the Bates number so that I can provide that to you, which will make it a lot easier.

THE COURT: We'll go off the record until y'all find the document.

(Off-the-record.)

MS. CORNEJO: (Indicating.)

MR. PAYLOR: Yes, this is the one.

MS. CORNEJO: Okay. I object. It's an affidavit of complaint for the arrest of Kalonji Warren, which has nothing to do with the affidavit of complaint -- which I have no objection to Mr. Harris' affidavit of complaint being tendered to the Court, but I don't believe that this is relevant.

THE COURT: So there are two different affidavits of complaint, one for the co-defendant and one for Mr. Harris?

1 MS. CORNEJO: Correct.

2 MR. PAYLOR: One for the co-defendant that the  
3 witness testified that he reviewed his statement, he reviewed  
4 the affidavit of complaint regarding this incident. And this  
5 affidavit of complaint states, and is signed by Detective  
6 Hallum, that he reviewed the body cam footage, which he  
7 indicated he did not. So I think it's relevant for purposes  
8 of --

9 THE COURT: Who reviewed the body cam footage?

10 MR. PAYLOR: Detective Hallum. That's what this  
11 affidavit says. And it's signed by him.

12 THE COURT: Okay. Well, I'm not sure what weight  
13 it deserves, but I'll consider it. Mr. Paylor, if you'll  
14 hand that forward. We'll make a copy of that. And while  
15 Mr. Knox is making a copy, Mr. Paylor, why don't you make  
16 whatever arguments you want to make as to why I should find  
17 that the photo array is unduly suggestive or  
18 should otherwise -- well, yeah, and grant your motion to  
19 suppress.

20 MR. PAYLOR: Okay. Your Honor --

21 THE COURT: And speak up.

22 MR. PAYLOR: Your Honor, in support of my motion  
23 to suppress the photo identification, you've heard testimony  
24 from Detective Hallum. In that testimony Detective Hallum  
25 indicated that he was responsible for generating the photo

1 lineup after he reviewed the affidavit of complaints in this  
2 incident, after he reviewed the incident report, after he  
3 reviewed the victim's statement, and after he reviewed the  
4 defendant's statement. And when asked what defendants he was  
5 referring to on cross-examination, he indicated that he was  
6 referring to the defendant's statement of Kalonji Warren.  
7 Because Mr. Harris had not yet been arrested in this matter.

8 So in reviewing those things, he generated a  
9 photo lineup. He used a program called Mug Shots to generate  
10 all the mug shots that he may have for individuals known as  
11 Kristopher Harris. He individually went through those mug  
12 shots, selected a mug shot to use, and then pushed a button  
13 for similar individuals. He pushed that button and a  
14 population of like individuals was generated. He testified  
15 that he went through that population and chose five other  
16 people that he believed to be similar in appearance to  
17 Mr. Harris.

18 On cross-examination, when comparing the  
19 individuals in Exhibit Number 2, which is the copy, the  
20 witness testified that he could not see any noticeably  
21 differences in the eye color of any of those individuals.

22 When I provided him with the original document  
23 and asked him the same, he indicated that he could see a  
24 difference in the color of the eyes of the individuals in the  
25 photo array. This is a photo array that was generated by

1 Detective Hallum. This is a photo array that the individuals  
2 in the photo array were selected by Detective Hallum.

3 Now, when I asked Detective Hallum if he recalls  
4 the description that the victim provided to him of the  
5 individuals responsible, he said he didn't recall. He didn't  
6 say he doesn't remember, because logic dictates that at the  
7 time you're generating this photo lineup, you have to have  
8 some descriptive features of someone to place in --

9 THE COURT: But he had the name.

10 MR. PAYLOR: He had the name of the individual.

11 THE COURT: Yes.

12 MR. PAYLOR: But he had to have other similar  
13 descriptions of individuals for the victim to select from.

14 If one individual in a photo lineup has light  
15 eyes and the victim is alleging that the individual who  
16 committed the offense had light eyes, then it's more --  
17 there's a greater likelihood that a victim will select a  
18 person with lighter eyes if comparing to other individuals  
19 without light eyes.

20 And on the photo array, it's our position that  
21 the only individual on there with light eyes is Mr. Harris.  
22 That in and of itself, it's our position, is suggestive. And  
23 it becomes unnecessarily suggestive when the officer has -- I  
24 asked him, were there thousands of people to select from? He  
25 indicated, yes, it's a whole lot of them.

1                   So when the officer has an opportunity to select  
2 other individuals with a characteristic of the perpetrators  
3 of this offense that the victim has described, and that you  
4 can see on the photo of Mr. Harris what color his eyes is --  
5 what color his eyes are, then the officer should go the next  
6 step to make sure that the other individuals in that photo  
7 array have similar colored eyes.

8                   So that's what makes it unduly or unnecessarily  
9 suggestive in our opinion.

10                  THE COURT: Okay. Ms. Cornejo, if you would like  
11 to be heard, I'm happy to hear you. I heard you over here.

12                  MS. CORNEJO: Your Honor, we rest on our response  
13 in our motion. The only thing we would like to say is all  
14 the arguments that counsel is making, it is the Government's  
15 position that ultimately to exclude this evidence, Your Honor  
16 would have to find that this was an unduly suggestive lineup.

17                  But, ultimately, Your Honor, if Your Honor does  
18 find that it was not unduly suggestive, the arguments that  
19 counsel makes, with all due respect, that's not appropriate  
20 before a trier of fact. It will be up to the trier of fact,  
21 whether it's a bench trial or jury trial, you know, to weigh  
22 the evidence, make the comparison of the eyes, and the skin  
23 tone, and assess the credibility of all the witnesses.

24                  It is just -- simply at this juncture, we believe  
25 that excluding this testimony doesn't go to the extraordinary

1       circumstances that have been suggested throughout various  
2       circuits.

3                   So based on everything, we respectfully ask that  
4       you deny counsel's motion.

5                   THE COURT: Okay. I'm going to mark the  
6       complaint -- the affidavit of complaint that Mr. Paylor asked  
7       me to consider as Exhibit Number 4.

8                   (Exhibit No. 4 was admitted into evidence.)

9                   THE COURT: Mr. Paylor, you're standing. Is  
10       there something else you wanted to say?

11                  MR. PAYLOR: I just had a brief response to the  
12       Government's position, Your Honor.

13                  THE COURT: Yes, sir.

14                  MR. PAYLOR: While the Government may think that  
15       this type of hearing is something for a jury to decide, I  
16       would respectfully disagree, Your Honor. This is a pure  
17       legal question. It's akin to any other type of motion to  
18       suppress. And we don't get to argue before a jury that this  
19       evidence shouldn't be admitted. The Court gets to decide  
20       that.

21                  And under these circumstances, the Government  
22       hasn't provided the Court with anything as it relates to a  
23       totality of the circumstances to compare, to determine if the  
24       Court determines that the photo array is unduly suggestive,  
25       what do you have now? The only other option you have is to

1 exclude it, because the Government hasn't provided the Court  
2 with any testimony as to a totality of the circumstances as  
3 to why it shouldn't be excluded. So it's not a question for  
4 a jury at this point, it's a pure legal question, Your Honor.

5 THE COURT: Okay. Mr. Paylor, I think the  
6 Government would agree that they're taking a gamble here.  
7 Because if I do find that the photo array is unduly  
8 suggestive, they have not presented evidence about the  
9 totality of the circumstances and so that's a risk they're  
10 willing to take.

11 So I'm going to read Exhibit Number 4 real quick,  
12 and then I'll get back with you.

13 (Court reviewing document.)

14 All right. So the Court has reviewed the  
15 Affidavit of Complaint, Exhibit Number 4, and there's  
16 absolutely nothing in here about the person's eyes. There's  
17 no reference to the person who fired the shot, that person's  
18 not described in the affidavit of complaint which is Exhibit  
19 Number 4.

20 Now, the Court would agree with the parties that  
21 at this point we are dealing with a motion to suppress that  
22 is arguing that the evidence of the identification of  
23 Mr. Harris, based on the photo spread that was shown to him,  
24 that there are two -- well, the motion argues that the  
25 identification should be suppressed. The evidence of that

1 identification should be suppressed for two -- well, because  
2 the photo array is unduly suggestive.

3 The Sixth Circuit has found that in order to  
4 suppress a photo identification, the Court should conduct a  
5 two-part test. First, the defendant bears the burden of  
6 proving that the identification procedure was impermissibly  
7 suggestive.

8 The defendant in this case relies on the actual  
9 appearance of the six individuals shown in the photo array as  
10 opposed to anything said to the witness and the like. There  
11 was no argument about anything other than the appearance of  
12 the individual photographs.

13 So the defendant has to convince the Court that  
14 the photo array was unduly suggestive. In, I believe it's  
15 Haliym, H-A-L-I-Y-M, versus Mitchell, which is a Sixth  
16 Circuit case from 2007, 492 F.3d 680, the Court said, quote,  
17 unnecessarily suggestive -- excuse me, unnecessary  
18 suggestiveness depends upon whether the witness's attention  
19 was directed to a suspect because of police conduct. That's  
20 the quote.

21 Now, in that case the Court found that the lineup  
22 in that case was unduly suggestive because the lineup  
23 contained five individuals, same race, same approximate age  
24 and stature, but only one person was bandaged and dressed in  
25 prison clothing.

1                   And the Court found that those distinctions  
2 clearly singled out that petitioner such that the procedure  
3 contained a very substantial likelihood of irreparable  
4 misidentification. But, here, it is not clear that the  
5 defendant's eyes set him apart from the other individuals in  
6 the photo array.

7                   If the Court -- and I'm going to look at Exhibit  
8 Number 3, which is the original, the one that the witness  
9 actually used. I'm looking at the photo array, and one thing  
10 I notice about the person in photograph number 1, who turns  
11 out to be the defendant, is that his eyes are actually  
12 looking down and to the right. They're not looking directly  
13 into the camera. And what that suggests to the person who's  
14 looking at that photo array is that the light could have  
15 something to do with the appearance of the eyes there.

16                   Having said all of that, as I look at the other  
17 individuals also depicted, there may be some slight variation  
18 among the six individuals in terms of their eye color,  
19 perhaps even their complexion, one person might have -- their  
20 hair might be a little taller than the other. But when you  
21 consider the overall appearance of the photo spread, no one  
22 is singled out in any way. These are what appear to be  
23 African American males who are roughly the same age. And the  
24 one individual, who's number 2, includes the height, the  
25 person's 5'8". All the other ones have lines behind that are

1 otherwise undescribed, or there are no other markings other  
2 than the lines behind them. Some of the individuals are  
3 looking directly into the camera.

4 I think, Mr. Paylor, if you look carefully at  
5 number 4, his eyes look maybe a little lighter than some of  
6 the others, but there is not enough of a difference between  
7 the person depicted in number 1 and the individuals depicted  
8 elsewhere in this photo spread.

9 Now, I'm going to call your attention to the case  
10 of United States versus Sullivan, that's a case that is  
11 another Sixth Circuit case, 431 F.3d 976, 985 is the precise  
12 page. It's a Sixth Circuit 2005 opinion, in which the Sixth  
13 Circuit affirmed the Court below.

14 And in that case the defendant argued that his  
15 picture was emphasized in a photo array because he was the  
16 only suspect in the entire lineup with noticeably blue eyes.  
17 And a majority of the witnesses described the robber as  
18 having blue eyes. The magistrate judge found in that case,  
19 it was agreed to by the District Court and the Sixth Circuit,  
20 the magistrate judge found that the photo array was not  
21 unduly suggestive. Because looking at the quality of the  
22 photographs and the characteristics of the individual in the  
23 lineup, the individual's eye color was not easily  
24 ascertained, and so it did not improperly single out the  
25 defendant.

1                   So as I'm looking at this, I will say, that -- I  
2 think, Mr. Paylor, you have used the description as having  
3 gray eyes. I would say, if anything, Mr. Harris's eyes  
4 appear to be brown in this photograph. Some might call it  
5 hazel eyes, I don't know. I'm looking at him from here and  
6 his eyes don't look all that light to me from here.

7                   So as I'm looking at the other individuals in the  
8 photographs, some of the eyes are somewhat lighter, darker,  
9 it just -- it doesn't stick out is the point I would make  
10 about the eye color.

11                  The Court finds that this case is similar to the  
12 Sullivan case. The difference between the defendant's hazel  
13 eyes or brown eyes and the other individual's brown eyes is  
14 very minor and does not appear to single out the defendant.

15                  So the Court finds that the defendant has not met  
16 his burden to show that the photo array is unduly suggestive;  
17 and, therefore, the Court is going to deny the motion to  
18 suppress.

19                  Ms. Cornejo, did I overlook anything?

20                  MS. CORNEJO: No, Your Honor.

21                  THE COURT: Mr. -- while I've got you standing,  
22 is there anything else you want to cover this afternoon?

23                  MS. CORNEJO: Your Honor, I believe we have a  
24 report date coming up later on this week, if not tomorrow.

25                  THE COURT: Well, should we go ahead and dispense

1 with that?

2 Mr. Paylor, first of all, anything else we need  
3 to cover this afternoon?

4 MR. PAYLOR: Well, Your Honor, we have two  
5 co-defendants, so I guess --

6 THE COURT: Oh, okay.

7 MR. PAYLOR: -- and they're set tomorrow as well,  
8 so I don't think we can dispense with it.

9 THE COURT: All right. Well, we'll look to see  
10 y'all tomorrow. Is there anything else we need to cover this  
11 afternoon?

12 MR. PAYLOR: No, Your Honor.

13 MS. CORNEJO: No, Your Honor. Thank you.

14 THE COURT: Okay. Before you leave, Ms. Cornejo,  
15 we're going to make a photocopy of Exhibit Number 3 --

16 MS. CORNEJO: Yes, sir.

17 THE COURT: -- and give you back your original.

18 MS. CORNEJO: Okay. Sounds good.

19 Is this the original, Milton? I have the  
20 original; right? I'm confused now.

21 THE COURT: I thought you gave us the original.

22 MS. CORNEJO: I did. Okay.

23 THE COURT: We're going to give it back to you.

24 MS. CORNEJO: Okay. I understand. Thank you.

25 THE COURT: Thank y'all.

1                   **MR. PAYLOR: Thank you, Your Honor.**

2                   **(Adjournment at 3:14 p.m.)**

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## C E R T I F I C A T E

I, CATHERINE J. PHILLIPS, Fellow of the Academy of Professional Reporters, Registered Merit Reporter, Certified Manager of Reporting Services, do hereby certify that the foregoing 53 pages are, to the best of my knowledge, skill, and abilities, a true and accurate transcript from my stenotype notes of the MOTION TO SUPPRESS (RESUMED) on the 15th day of December, 2020, in the matter of:

UNITED STATES OF AMERICA

vs.

# KRISTOPHER HARRIS

Dated this 8th day of January, 2021.

S/ CATHERINE J. PHILLIPS, FAPR, RMR, CMRS  
Official Court Reporter  
United States District Court  
Western District of Tennessee